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No. 9, Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.
(ALABAMA AND MISSISSIPPI BOUNDARY CASES)

ON THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE EXCEPTIONS OF THE STATE OF MISSISSIPPI

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STATEMENT

In October 1979, Mississippi and Alabama filed petitions for a supplemental decree to revive what had been a dormant aspect of the broader Gulf of Mexico tidelands dispute: the status of Mississippi Sound, the water area immediately south of the mainland shore of those two states and stretching from Mobile Bay at the east to Lake Borgne at the west. [1] They claimed that the whole of Mississippi Sound was part of their "inland waters" under the Submerged Lands Act, 43 U.S.C. 1301(c), so that their "coast lines" started at the barrier islands some six to ten

[1] Mississippi Sound is depicted in Chart I, appended to the Exceptions of the United States and Supporting Brief filed in this case in June 1984.

miles offshore and at lines connecting that fringe. Thus, in their contention, they were entitled to the lands, minerals and other natural resources beneath that Sound, as well as to those in the Gulf of Mexico within three geographic miles of that constructive "coast line." In March 1980, the United States cross-moved for a contrary decree, submitting that Mississippi Sound constituted neither a juridical bay nor historic internal water, and that therefore there were certain "enclaves" of high seas between the main shore and the islands, the rights to which were vested in the federal government.

The Court referred the matter to the Special Master who, after extensive hearings, in April 1984 filed a Report recommending that the Court hold for the States on both juridical and historic theories. After all parties lodged Exceptions, the Court decided that "the whole of Mississippi Sound is a historic bay" and remanded to the Master for formulation of an appropriate decree. Alabama and Mississippi Boundary Case, 470 U.S. 93, 115 (1985).

On remand from that decision, the Alabama portion of that proposed decree was worked out quickly, but Mississippi and the United States disagreed 2/ over the former's insistence that seabed beneath Chandeleur Sound, to the south of the area contested in the proceedings resulting in this Court's 1985

2/ There was additional dispute respecting a headland for a closing line between Horn and Petit Bois Islands, on which the Master found in favor of the United States (Supplemental Report 4-10, 29, fig. 1). There is no Exception here on this score.

decision, be awarded to it, also. In our arguments to the Special Master, we recognized that this Court's reference was limited to fixing a line which defined Mississippi Sound (i.e., one passing from Petit Bois Island on Mississippi's east side to Cat Island and Isle au Pitre on the west). However, in order to complete the establishment of Mississippi's Submerged Lands Act coast line and thereby avert the possibility of future proceedings for a further supplemental decree, we offered to recognize that State's rights in the vicinity of Chandeleur Sound on the basis of an extension of the line stipulated in earlier litigation between the United States and Louisiana, embodied in the Decree in United States v. Louisiana, 422 U.S. 13 (1975) (a line running from the location at that time of the northernmost of the Chandeleur Islands to a point near the middle of West Ship Island).

Mississippi declined our offer. The Special Master, though stating his preference for the United States-sponsored Chandeleur Sound line, concluded that he lacked authority under the Court's reference to endorse that comprehensive resolution absent agreement by the parties. 1/ He recommended a closing line across Mississippi Sound only. See Supplemental Report 23-27. Mississippi's Exceptions followed. Those exceptions relate

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1/ Neither of the parties has filed an Exception on the ground that the Special Master should have adopted that proposal of the United States in the absence of agreement by Mississippi. The contention to that effect by the State of Alaska in an amicus curiae brief in this Court therefore addresses a question not raised by the parties before this Court.

solely to the Chandeleur Sound question, and do not contest the validity of the closing line adopted by the Master for Mississippi Sound (see note 2, supra).

I. IN THE DECREE PHASE OF THIS CASE ABOUT DELIMITATION OF SUBMERGED LANDS UNDER MISSISSIPPI SOUND, IT IS UNTIMELY AND INAPPROPRIATE FOR MISSISSIPPI TO DEMAND A DETERMINATION OF THE STATUS OF CHANDELEUR SOUND AS WELL

Mississippi now seeks (Br. 2, 9-11) a determination that Chandeleur Sound is inland water. It is inappropriate for the State to attempt to add this question -- factually and legally debatable -- to the matters properly at hand. The State commenced this proceeding with the assertion (Motion for Supp. Decree 3, October 31, 1979) that its coast line is the "chain of islands extending from Petit Bois Island to Cat Island. . . ." The historical evidence on which the Master made findings and the Court ruled related exclusively to the usage of the waters (Mississippi Sound) north of that island chain: commerce, communications and defense activities which the Court deemed sufficient to stake out a national claim to sovereignty over that area which passed to the coastal states under the Submerged Lands Act. Mississippi and Alabama Boundary Case, 470 U.S. at 102-106. The Court also relied on its previous determination in Louisiana v. Mississippi, 202 U.S. 1, 48 (1906), that Mississippi Sound was "an inclosed arm of the sea, wholly within the United States, formed by a chain of large islands* * *from Mobile, Alabama to Cat Island," and on statements in briefs filed by the United States that the Court's 1906 ruling had dispositively established

an inland water claim to Mississippi Sound. See 470 U.S. at 107-110. The Court was perfectly clear in its 1985 opinion as to the bounds of the area it determined an historic bay, 470 U.S. at 96; Chandeleur Sound was not at issue and not included. There is, accordingly, no basis at all in the Special Master's findings or in the matters that were at issue before him, for a determination by this Court with respect to the status of Chandeleur Sound.

It is our position that Chandeleur Sound is not juridical inland water under the Court's cases incorporating the standard of Article 7(2) of the Convention on the Territorial Sea and the Contiguous Zone because it is not an indentation into the mainland and its island fringe does not render it "landlocked" within the meaning of that Article. See United States v. California, 381 U.S. 139, 164 (1965); Louisiana Boundary Case, 394 U.S. 11, 66-71 (1969). To be sure, as Mississippi notes (Br. 10-11), the United States had, prior to the California decision, indicated that Chandeleur Sound was inland waters pursuant to various delimitation theories antedating the Convention. It is largely because there was a cacophony of differing earlier rules, and because the international stance of the United States with respect to them had no consistent thread, that the California Court selected the Article 7 benchmark. See 381 U.S. at 163 n. 27, 165-166 and n. 33. And, for similar reasons the Court rejected Louisiana's contention that the United States was bound by earlier statements inconsistent with the Convention. Louisiana Boundary Case, 394 U.S. at 66-67 n. 87, 73 n. 97.

Surely it is untenable to posit an historic inland water claim -- the touchstone of which is longstanding consistency of claim and acquiescence -- to Chandeleur Sound on such shifting ground.

All of this being said, the United States nevertheless reached an accommodation with Louisiana in which, while the parties preserved their legal positions on what was inland or not, it was agreed that State's domestic Submerged Lands Act jurisdiction would embrace the waters within a line from the north point of the Chandeleurs to the middle of West Ship Island. See Supplemental Report of Special Master 13-14, March 16, 1987; Report of Special Master 63, App. A-2, July 31, 1974.

Accordingly, in the proceedings on remand from the Court's 1985 decision we deemed it both equitable and efficient to offer the same accommodation to Mississippi. Such an agreement would have avoided discontinuity in the seaward limits of Mississippi's and Louisiana's Submerged Lands Act rights, as the Special Master recognized. Mississippi has eschewed such an agreement, presumably on the basis that it has a meritorious legal claim that Chandeleur Sound is inland water. Any such claim, however, remains for consideration in proceedings that may be initiated to seek a further supplemental decree, since no legal or factual foundation for such a determination has been established in the proceedings thus far. In short, there is in our view no issue for this Court to decide, since Mississippi has not excepted to the Special Master's disposition of the matters

referred to him by this Court and the questions Mississippi seeks to raise are not properly before the Court at this time.

II. EVEN IF CHANDELEUR SOUND WERE TO BE TREATED AS INLAND WATER, THERE IS NO BASIS FOR THE DELIMITATION PROPOSED BY MISSISSIPPI

At all events, Mississippi's claims with respect to Chandeleur Sound are without merit. Even if Chandeleur Sound were regarded as inland water, the State would be entitled to no more favorable "coast line" than that which the United States offered and it has thus far disdained. If we indulge, arguendo, any of the several formulations Mississippi advances, there would still be no justification for the decree line (closing Chandeluer Sound with a line to the extreme east end of East Ship Island) it urged upon the Master. Indeed, the State has articulated no basis whatever for that line -- either to the Master or in its Exceptions and Brief. (Indeed, Mississippi here (Br. 25-26) appears to recede from that decree line, asking the Court to return the case to the Master for adoption of some indeterminate "baseline joining appropriate points on Ship Island and the northernmost tip of the Chandeleur Islands* * *.").

Each of the disconnected points made by Mississippi finally amounts to an effort to tax the United States with some pre-Convention delimitation practice, whether it be the ten-mile rule (Br. 10-11), 4/ the Chapman Line (Br. 11-12), the fictitious bay concept (Br. 20-21), the roots of the stipulation with

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4/ It bears mention that Mississippi's proposed line would fail this test -- it is some 13 miles long.

Louisiana described above (Br. 8, 13), or United States briefs filed in earlier litigation (Br. 10, 11-12). None of that delimitation practice involved or supported the drawing of a closing line resembling the excessive one the State espoused below to the Master. Most significantly, the Chapman Line, cited by the Court to the States' favor in the instant Alabama and Mississippi Boundary Case, 470 U.S. at 106 n. 9, was developed in the wake of the very first of the Court's Gulf tidelands cases, United States v. Louisiana, 339 U.S. 699 (1950). It closed Chandeleur Sound by a line to the west tip of the westernmost of the Ship Islands -- a result substantially less advantageous to the States than the line created in the 1975 Louisiana Decree and offered to Mississippi here. Supplemental Report 20; 1 Shalowitz, Shore and Sea Boundaries 109 n. 8 and accompanying text (1962). Accordingly, to the extent that the United States were bound by its earlier practice, there would be no profit in this for Mississippi. 5/

5/ Thus, Mississippi errs in suggesting (Br. 17), that this case may present the troublesome "contraction of a State's recognized territory" hypothesized in United States v. California, supra, 381 U.S. at 168; and Louisiana Boundary Case, supra, 394 U.S. at 73 n. 97, 77; Alabama and Mississippi Boundary Case, supra, 470 U.S. at 111-112.

CONCLUSION

The Report of the Special Master should be approved.

Respectfully submitted.

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